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In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHERN PLAINS RESOURCE COUNCIL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

RICHARD J. OSTERMAN, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

EDITOR'S NOTE

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QUESTION PRESENTED

Whether petitioners have standing to challenge a decision of the Interstate Commerce Commission that authorized contruction of a rail line, when petitioners' challenge is based solely on a provision of the Mineral Lands Leasing Act of 1920 that bars "a corporation operating a common-carrier railroad" from holding a federal coal lease, and none of the petitioners is a member of any group the statute was intended to protect.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 817 F.2d 758 (Table). The decision of the Interstate Commerce Commission (Pet. Supp. App. 1d-51d) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1987. A petition for rehearing was denied on June 11, 1987 (Pet. App. 1b). The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 10901, a railroad may construct and operate a railroad line "only if the Commission finds that the present or future public convenience and necessity require or permit the construction * * * and operation of the railroad line" (49 U.S.C. 10901(a)). This case arises

from an application by the Tongue River Railroad Company (TRRC) to construct and operate an 89-mile rail line between two cities in Montana (Pet. Supp. App. 1d).[1] The area that TRRC's proposed rail line was designed to serve contains reserves of mineable low sulfur coal, estimated at 10 billion tons, that are owned by various private and public interests including the United States and the State of Montana; the area currently lacks suitable transportation to serve these coal reserves (*id.* at 3d).

TRRC's application was opposed by petitioner organizations on behalf of nearby landowners and other interested individuals. Petitioners contended, inter alia, that TRRC's proposal is barred by Section 2(c) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 202. That Section generally prohibits any company or corporation that operates a common carrier railroad from holding a permit or lease for any federal coal deposits unless the coal is used exclusively to meet the railroad's fuel needs (Pet. App. 1c). Petitioners contended that a violation of Section 2(c) would exist because one of TRRC's general partners, Transportation Properties, is affiliated with Thermal Energy, Inc., the holder of a disputed federal coal lease.[2]

Following public hearings, an ICC administrative law judge (ALJ) concluded that Section 2(c) of the Leasing Act would not be violated (Pet. Supp. App. 25d-28d). The ALJ granted TRRC's applications, subject to mitigation measures designed to offset any adverse effects on adjacent landowners.

2. The only issue raised on appeal to the Commission was the ALJ's construction of Section 2(c) (Pet. Supp.

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[1] TRRC also sought authority under 49 U.S.C. 11301 to issue securities to finance construction of the rail line.

[2] The coal lease in question (M-54714) has been suspended on grounds unrelated to Section 2(c). *Northern Cheyenne Tribe* v. *Hodel*, No. CV-82-116-BLG (D. Mont. Oct. 6, 1986).

App. 2d, 21d; see Pet. 5 n.2). The Commission modified and, as modified, affirmed the ALJ's initial decision. The Commission stated (Pet. Supp. App. 40d-41d) that Section 2(c) prohibits only railroad *operations,* which could not begin for at least three years (until construction is completed). Moreover, as the validity of the federal coal lease involved was in question (see note 2, *supra*), any potential violation of Section 2(c) by TRRC would be neither an immediate nor certain outcome of approving the applications. Under the circumstances, the Commission decided to defer to the Department of the Interior, the agency charged with administering the Leasing Act, on the Section 2(c) issue. The Commission explained that in the absence of Department of Interior guidelines, there could be no assurance that it could resolve the Section 2(c) issue in a manner consistent with the Interior Department's interpretation (Pet. Supp. App. 42d-43d).[3] The Commission therefore authorized construction of TRRC's proposed line (for which it found that a clear need existed (*id.* at 43d-45d)) but withheld approval for the line to become operational until the Section 2(c) issue is resolved.

3. Petitioners sought review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit. Petitioners' sole contention on appeal was that the agency's decision was contrary to Section 2(c) of the Mineral Lands Leasing Act (Pet. 5 n.2; Pet. App. 2a).

The court of appeals dismissed the petition for review on the ground that petitioners lack standing to raise the Section 2(c) issue. The court of appeals stated that peti-

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[3] Prior to 1980, the Department of the Interior had applied an alter ego test to determine whether an affiliated company should be considered a railroad for purposes of Section 2(c). In 1980, the Department of Justice proposed a more expansive set of standards. After reviewing that proposal, the Interior Department decided that it would no longer apply the alter ego test, but it expressly declined to adopt other standards (see Pet. Supp. App. 24d-25d).

tioners "must establish that [they have] suffered an injury in fact and that [their] interests are arguably within the zone of interests to be protected or regulated by the statute that the plaintiff claims the agency violated" (Pet. App. 3a). As Section 2(c) was passed as a result of "[c]oncerns over railroad monopolization of the coal industry," the court concluded that the statute reflected Congress's fear that "if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation" (Pet. App. 3a). The court therefore concluded that Section 2(c) was intended to protect independent coal companies from unfair competition and, because petitioners' members are landowners who neither compete with TRRC nor are in the coal business, petitioners are "not 'within the zone of interests protected' by [S]ection 2(c)" (Pet. App. 3a-4a (citation omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

The Hobbs Act, 28 U.S.C. 2344, expressly states that only a "party aggrieved" by an agency order may seek judicial review. See *Water Transport Ass'n* v. *ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987); 5 U.S.C. (Supp. IV) 702 (granting standing to a person "aggrieved by agency action within the meaning of a relevant statute"). While petitioners participated in the agency proceedings and clearly are parties, they are not aggrieved within the meaning of the Hobbs Act and the Administrative Procedure Act.

In applying the statutory standard for judicial review, courts " 'have engaged in traditional standing doctrine analysis.' " *Water Transport Ass'n* v. *ICC*, 819 F.2d at 1193 (citation and footnote omitted). Under that analysis, before petitioners may obtain judicial review of the Com-

mission's ruling on the Section 2(c) issue, they must establish (1) that the agency's action caused them "injury in fact" and (2) that this injury was "arguably within the zone of interests to be protected or regulated by the statute" upon which they rely. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp,* 397 U.S. 150, 151-153 (1970).

Petitioners' challenge to the Commission's decision is based solely on Section 2(c) (Pet. 5 & n.2). Assuming they suffered "injury in fact,"[4] petitioners do not fall within the zone of interests protected by the statute. As is well recognized, Section 2(c) was enacted out of fear "that if railroads were allowed to own coal mines they would discriminate in transportation against competing coal mines which depend on rail transportation * * *." *Northern Indiana Public Service Co.* v. *Carbon County Coal Co.,* 799 F.2d 265, 271 (7th Cir. 1986); see 58 Cong. Rec. 4739 (1919) (remarks of Sen. LaFollette); *National Coal Ass'n* v. *Hodel,* 617 F. Supp. 584, 588 (D.D.C. 1985), aff'd, 825 F.2d 523 (D.C. Cir. 1987).

Petitioners and their members are not in the coal business, nor are they involved in the production or

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[4] Contrary to petitioners' assertion (Pet. 8), the court of appeals did not reach the question whether petitioners suffered injury in fact. The court simply stated (Pet. App. 4a) that, for purposes of its analysis, petitioners were "arguably affected by the ICC's decision." Any injury to petitioners' members would relate to the concerns they raised regarding the condemnation of land for the right-of-way and the adverse environmental impacts caused by construction of the rail line. But petitioners do not challenge the Commissioner's decision on either of those grounds. The sole challenge petitioners pressed before the Commission, the court of appeals and this Court – the alleged violation of Section 2(c) – does not relate in any way to the agency's findings on the need for the rail line or on the most effective means of mitigating potentially adverse environmental consequences (Pet. 5 n.2).

distribution of energy.[5] The landholding interests petitioners seek to protect (against condemnation or adverse environmental consequences) are wholly distinct from the policies underlying Section 2(c). As petitioners state (Pet. 11), a party may fall within the protected zone of interests even though there is "no indication of congressional purpose to benefit the would-be plaintiff" (*Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 10-11), but that would not suffice to confer standing when "the plaintiff's interests are so marginally related to * * * the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" (*id.* at 10).[6] Petitioners' interest in this case is not even marginally related to the purposes of Section 2(c). Indeed, the means ordinarily employed to avoid or cure a Section 2(c) violation—cancellation or divestiture of the federal coal lease, severance of the rail line's affiliation with the lease holder, or substitution of another applicant—would have no effect on petitioners' interests. Thus, the court of appeals properly found that petitioners are not within the zone of interests protected by Section 2(c).[7]

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[5] Indeed, no potential competitor in either the railroad or coal business has complained of a potential violation of Section 2(c) by TRRC in this case.

[6] This Court has described as the "essential inquiry" the question whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke* v. *Securities Industry Ass'n*, slip op. 10 (quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). Surrounding landowners are clearly not a class Congress relied upon to enforce Section 2(c). Congress specifically provided for the Interior and Justice Departments to monitor Section 2(c) compliance. 30 U.S.C. 184(h)(1), 189; see 43 C.F.R. 3452.2-1(a).

[7] There is no merit to petitioners' attempt to circumvent the court of appeals' standing analysis by arguing (Pet. 15) that they are generally within "the zone of interests to be protected by the Transportation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

RICHARD J. OSTERMAN, JR.
Attorney
Interstate Commerce Commission

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Act, 49 U.S.C. § 10901 and 49 U.S.C. § 11301." The sole ground upon which petitioners challenge the agency's Section 10901 and 11301 findings is that those findings would permit a violation of Section 2(c) of the Mineral Lands Leasing Act (see Pet. 5).

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